The result is that a member of the Forces, although not himself liable under Section 6 of the Proclamation, may be liable for abetment or an attempt under the Penal Code. This objection therefore fails.

The second point turns upon the construction of Sections 108, 109 and 40 of the Penal Code. Section 108 reads as follows.—

> A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

It is clear that the act of the accused could not amount to abetting the commission of an offence within the meaning of the first part of this section because the carrying of arms by a detective, who is a member of the Police Force, is not an offence. The next question therefore is whether the case falls within the second branch of Section 108. Was the act of the detective in carrying this arm an "act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor?" Were it not for the provisions of Section 40 of the Penal Code I would be prepared to hold that it was such an act. Illustration (d) to Explanation 3 to Section 108 is an example of an act which would have been an offence but for circumstances peculiar to the person who committed the act, in the same way that a detective who carried arms would be guilty of an offence but for the particular fact that he is a member of the Police Force.

By reason of Section 40 of the Penal Code, however, the expression "offence" in Section 108 denotes only an offence punishable under the Code. And it is only by virtue of Section 108 that the abetment of an act which is not itself punishable can be made punishable under Section 109. The latter section punishes anyone who abets any "offence", which here means an offence against the Penal Code or any other law. Section 108 has the effect of extending the meaning of the expression "abetting an offence" by including in that expression the abetment of acts which are not, but which in certain circumstances would be, offences under the Penal Code itself. It does not extend it to include the abetment of acts which are not offences but which might in certain circumstances be offences against laws other than the Penal Code.

The results which flow from Section 40 giving a different meaning to the word "offence" in Sections 108 and 109 seem at first sight somewhat peculiar. I must assume, however, that the difference is intentional.

The result in my opinion is that a member of the Armed Forces or of the Police Force may be liable for abetting the offence of carrying arms if the person abetted is not a member of the Armed Forces or the Police but cannot be made liable for abetting the act of carrying arms by any person who is a member of the Armed Forces or of the Police.

The charge against the accused in this case under Section 109 of the Penal Code and Section 3 (1) of the Public Order and Safety Proclamation is therefore bad.

Preliminary Objection Upheld.

PUBLIC PROSECUTOR v. YAP TAI (f).

[App. Crim. Juris. (Spenser-Wilkinson, J.)
January 2, 1947]

Land Code, Sections 17, 29, 250 and 251—Land Rules 1930, Rule 40—State land held under temporary occupation licence—Failure to vacate after notice to quit—Unlawful occupation—Reasonable notice of revocation must be given—Interpretation of Statutory Code.

The respondent had been in occupation of an area of State land in Kuala Lumpur for a number of years under Temporary Occupation Licence issued from time to time in accordance with Section 17 of the Land Code and Rule 40 of the Land Rules, 1930. The last licence held by the respondent expired on the 31st December 1945. Renewal of the licence appears to have been recommended on the 8th March 1946, but no further licence was in fact issued. On the 31st May 1946, a notice was served upon the respondent requiring her to vacate the land and demolish the house on it within 80 days of the date of service of the notice. The respondent having failed to leave the land, an information was laid on the 25th October, 1946 by the Collector of Land Revenue to the effect that she had failed to vacate and was still in occupation of the land and praying that she be summoned to appear before the Court on the hearing of the information. The information was heard by the District Judge on the 25th November 1946. The District Judge dismissed the summons on the ground that the occupation of the respondent was not unlawful within the meaning of Section 250 of the Land Code. He based his decision on the view that there is no difference between the case of the respondent and that of a tenant holding over after the expiration of a lease and as the position of such a tenant is recognised by law his occupation cannot be said to be unlawful. The Public Prosecutor appealed against this decision.

Held, (1) that the intention of the Land Code is that the occupation of State land under Section 17 should be temporary and under licence only; that sections 250 and 251 of the Land Code are intended to supply a summary procedure for the ejectment of temporary occupants who hold over; and that the occupation of State land without licence whether because the licence has expired or because it was never acquired is contrary to the provisions of the Code in that it is inconsistent with its provisions, and it is intended to be included within the meaning of the term "unlawful occupation";

(2) that a licensee whose licence is revoked would probably be entitled to reasonable notice of revocation and that the ninety days given in this case was in all the circumstances reasonable.

MLJ 2007

Cases referred to:

(1) *Glenwood Lumber Company v. Phillips* (1904) A.C. 405.

(2) *Ong Tin v. Seremban Motor Garage* 1 F.M.S.L.R. 308.

(3) *Robinson v. Canadian Pacific Railway Company* (1892) A.C. 481.

(4) *Cowan v. Milbourn* L.R. 2 Ex. 280.

(5) *Mercantile Steamship Company v. Hall* (1909) 2 K.B. 423.

(6) *Canadian Pacific Railway v. King* (1900) 2 K.B. 423.

CRIMINAL APPEAL FROM DISTRICT JUDGE.

E. N. Griffith Jones for the appellant.

Respondent absent and unrepresented.

Spenser-Wilkinson, J.: —The Respondent has been in occupation of an area of State Land at the 2½ milestone, Cheras Road, Kuala Lumpur, for a number of years under Temporary Occupation Licence issued from time to time in accordance with Section 17 of the Land Code and Rule 40 of the Land Rules, 1930. The last licence held by the respondent expired on the 31st December, 1945. Renewal of the licence appears to have been recommended on the 9th March, 1946, but no further licence was in fact issued. On the 31st May, 1946, a notice in the following form was served upon the respondent:—

> The area covered by your T.O.L. No.—Mukim of K.L. Town is required for the purpose of a site for Government Workshops.
>
> You are hereby required to vacate the land and demolish your house within 90 days from the date of service of this notice failing which legal proceedings will be instituted against you.

The respondent having failed to leave the land in question, an information was laid on the 25th October, 1946, by the Collector of Land Revenue under Section 250 of the Land Code against the respondent to the effect that she had failed to vacate and was still in occupation of the land and praying that she be summoned to appear before the court on the hearing of the information.

The information was heard by the District Judge on the 25th November 1946, when the Assistant Collector of Land Revenue gave evidence of the facts above stated. Evidence was given on behalf of the respondent by her son.

It may be here mentioned that the summons issued pursuant to the information was not in the form laid down by the Land Code but was in the form of a charge purporting to be a charge under Section 251 of that Code. A similar charge is recorded in the Court record. There was thus an irregularity in the proceedings, which should have taken the form of a hearing and determination of the information and not the form of a trial upon a charge. I do not think, however, that this was a matter which in any way prejudiced the respondent, and I therefore proceed to consider the point of substance raised by this appeal.

The District Judge dismissed the summons on the ground that the occupation of the respondent was not unlawful within the meaning of Section 250 of the Land Code. His decision was based on the view that there is no difference between the case of the respondent and that of a tenant holding over after the expiration of a lease and that as the position of such a tenant is recognised by law his occupation cannot be said to be "unlawful."

Before dealing with the grounds of decision of the District Judge, it seems to me that the question arises whether the occupation by the respondent of this State land was a tenancy or a mere licence. For if the respondent was only a licensee, then upon the determination of the licence her continued occupation of the land would be a trespass.

In support of the view that a Temporary Occupation Licence under the Land Code creates rather a licence than a tenancy are the following considerations. The Land Code uses the word "licence" in all the relevant provisions; under Section 17 of the Land Code the Resident has no power to permit anything except temporary occupation of State land under licence; under Section 29 occupation of State land under licence for temporary occupation does not establish any right in or possession of State land; and no rent is reserved by a Temporary Occupation Licence but a licence fee is charged.

If the matter were tested by the ordinary rules of English Common Law governing the interpretation of documents *inter partes*, then it would seem probable that the transaction might be held to have created a tenancy in spite of the use of the word "licence" because the expressed purpose of the document is for a dwelling house and exclusive occupation of an area seems to be given to the licence holder.

There is one important decision which must be considered in this connection because if it applies to

the case now before me I should feel bound to follow it. I refer to the decision of the Privy Council in *Glenwood Lumber Company v. Phillips*[1]. It was decided in that case that a document issued by the Governor of Newfoundland, in pursuance of the provisions of a Newfoundland Statute, "licensing" certain land to the respondents in that case for the purposes of cutting timber thereon was a lease in spite of the use of the word "licence" in the document itself. When, however, the provisions of the Land Code and of a temporary occupation licence issued under it are considered and compared with the transaction in this Newfoundland case, it appears that the facts of the latter case were almost the reverse of of the facts in the case now before me. The following points show how widely different was the position there from the case now under consideration. The Act under which the document purported to be made speaks of a lease and describes the holder as a lessee; the instrument in that case "licensed" to the respondent all that piece or parcel of land particularly described: the respondent was to hold the land for the term of twenty-one years; and an annual rent of $96/- was reserved.

In effect, the transaction there gave the respondents exclusive possession of a specified piece of land for a term certain at an annual rental. Apart from the question of exclusive possession none of these features exist in the present case. But their Lordships in their judgment state "if the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used it is in law a demise of the land itself." These are strong words, though I do not think they do more than state the common law rule on the subject. No doubt English Common Law applies to Newfoundland. But I am in some doubt as to the extent to which it is permissible to invoke the rules of English Common Law in order to ascertain the effect of a transaction carried out in accordance with the express provisions of an enactment passed by the legislature of an independent Malay State which Selangor undoubtedly was when the Land Code was enacted. The Civil Law Enactment does not, in my opinion, affect the position because Section 2 of that enactment imports the Common Law of England only save in so far as other provision has been made by any other written law and provisions dealing with State land are contained in the Land Code. Nor do I think the Malayan Union Order in Council can affect the interpretation of the Land Code on a question of this kind because no modification of that Code appears to be necessary upon the points in issue to bring it into conformity with the provisions of that Order.

In any event it does not appear to me to be permissible to depart from the strict wording of a codifying Enactment which the Land Code appears to be (see *Ong Tin v. Seremban Motor Garage*[2]) unless there is no other way of ascertaining its meaning. As was said by the Privy Council in *Robinson v. Canadian Pacific Railway Company*[3] :—

> The language used by Lord Herschell in **Bank of England v. Vagliano Brothers**, with reference to the Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61) has equal application to the Code of Lower Canada: "The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities." Their Lordships do not doubt that, as the noble and learned Lord in the same case indicates resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground.

In the Newfoundland case above quoted, the statute under which the transaction was carried out used the word "lease", and it was presumably some individual who drew up the instrument in question who used the word "licence". There is nothing to suggest that the document, in that case was in any prescribed form. Here, it is the Enactment itself which uses the word "Licence" and the document is in a form laid down by rules made under the Enactment. The effect of the transaction, therefore, is governed, not by any expression used by the parties, but by the Land Code itself.

It seems to me that it would be altering the language of the Land Code to interpret the expression "temporary occupation of State land under licence" as meaning occupation of State land as a tenant. The legal meaning and effect of the word "licence" in English law was well settled at the time when the Land Code was passed. If the legislature here used the word in the light of the sense thus settled, as a word which had "previously acquired a technical meaning" then I think the true construction is that it was used deliberately in contradistinction to a tenancy; if the word "licence" was used in its ordinary everyday sense without reference to its common law meaning, then there seems to be no reason to import into the resulting transaction the notion of a tenancy. I think, therefore, that the decision in the Newfoundland case does not

apply to the facts of this case and the intention of the Land Code is that a Temporary Occupation Licence is not to create a tenancy.

In case I am wrong in concluding that an occupier under a Temporary Occupation Licence is not a tenant, I think it advisable to consider briefly the position on the assumption that some form of tenancy was created. It seems to me that if any tenancy is created at all by a Temporary Occupation Licence it must be a tenancy at will because it is expressed to be terminable at any time (*Redman,* 8th Ed. p. 2; *Woodfall* 22nd Ed. p. 275; *Hailsham* Vol. 20 pp. 117, 118). If the occupier continued in occupation of the land after the expiration of such a tenancy he would, if the land were privately owned, be a tenant at sufference. But at Common Law there can be no tenancy at sufferance against the Crown (*Halsbury* 2nd. Ed. Vol. XX para 135; *Woodfall's* Landlord and Tenant 22nd. Ed. p. 283, both quoting Co. Lit. 57 (b)). I think it must be assumed that if Common Law principles are to be applied to a Malay State the same considerations where applicable, should apply to the Soverign of that State as apply under English Law to the Crown. It is not necessary for me to decide this point, however, because at the material time the land in question had become Crown land. Whatever form of tenancy may have subsisted during the period immediately after the expiration of the licence, the respondent could not in any event be more than a tenant at sufferance on the the expiration of the notice which was served on him on 31st May, 1946; and being on Crown land he could not even be a tenant at sufferance.

I conclude therefore that in the month of August, 1946, when the notice to vacate had expired, the respondent was either a licensee whose licence had been revoked by notice or a tenant at will whose tenancy had determined. She was thus, upon either view, a mere trespasser, and, as I have already indicated, I am of opinion that the true transaction is one of licence and not lease.

The next question that arises is what is the meaning of the expression "unlawful occupation" as used in Section 250 of the Land Code. The learned District Judge has based his decision largely upon the case of *Cowan v. Milbourn*[4]. The actual words used in the judgment of Bramwell B. are as follows :—

> It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a Court of law.

In *Mercantile Steamship Company v. Hall*[5] it was held that stipulations in an agreement between a shipmaster and crew inconsistent with any of the provisions of the Merchant Shipping Act 1894 are contrary to law within the meaning of Section 114 of that Act. In giving judgment in that case Pickford, J. said :—

> Of course a stipulation may be contrary to law in a great many ways. It may be contrary to the general law, but it is not suggested that the stipulation is so here. Or it may be contrary to certain express provisions of the Merchant Shipping Act. There are no express provisions in that Act prohibiting stipulations of this description; therefore I have to consider whether, if stipulations are not expressly prohibited by the Act, they are contrary to law within the meaning of s. 114 if they are inconsistent with the provisions of the Act. I am of opinion that they are.....".

These and many other decisions which I have considered deal with the question of illegality or unlawfulness in regard to the enforcement or validity of contracts. I have been unable to find any guidance as to the exact meaning of the word "unlawful" in relation to an act such as the occupation of land. In *Byrne's* Law Dictionary the following passage occurs :— "'Unlawful' and 'illegal' are frequently used as synonymous terms,".....and the definition proceeds to discuss the use of the word as applied to contracts.

The word "illegal" is defined in the Penal Code but not the word "unlawful". Section 43 lays down that the word "illegal" is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action.

In *Gour's* commentary on the Indian Penal Code the learned author comments as follows (5th Ed. para 330 p. 203) :—

> This section defines the term 'illegal' but the Code frequently uses the term 'unlawful' in connection with an act where it is intended to connote an act not supported by law as distinct from an act which is 'illegal' in the sense that it is prohibited by law. As such, the term 'unlawful' is wider in its import, since an act may not be illegal in that there is no law prohibiting it and it may not furnish ground for a civil action, since, in the absence of a statutory law of torts applicable to this country, the right of civil action depends upon the rule of justice, equity and good conscience, which does not rule out customary usages, e.g. forced labour, and slavery—now prohibited by ss. 370 and 371. The terms 'unlawful' is then an elastic term and its sense varies and eludes a legal definition.

The English authorities appear to me to indicate a wider meaning for the term "unlawful" than the

District Judge has given to it; and the meaning of the word in the Penal Code appears to be very wide indeed. In applying to Colonial Statutes the rule that terms are to be read in their English meaning at the date of the passing of an Act, regard must be had to any difference between English and Colonial usage as to the meaning attached to a word or phrase (*Craies* on Statute Law 4th Ed. p. 80). In construing the word "unlawful" occurring in Part XXII of the Land Code which is headed "Penalties", I think it must be assumed that the legislature intended the word to have a meaning at least akin to, even though not identical with the meaning of the word in the Penal Code.

The District Judge has referred to Sections 250 and 251 of the Land Code as being, penal provisions which must be strictly construed. It is Section 252, however, which is the penal provision, and it may well be that a greater degree of unlawfulness would be required to support a prosecution under that Section than is required to support proceedings under Sections 250 and 251 for under Section 252 the occupier would be an accused person entitled to the benefit of any doubt. I am concerned, however, only with Sections 250 and 251. These provisions seem to be somewhat analogous to the provisions of the Small Tenements Recovery Act, 1838, which is an Act to facilitate the recovery of possession of tenements after due determination of a tenancy. That Act provides a summary remedy to landlords whereby a warrant can be obtained from the Justices to dispossess the tenants within twenty-one days.

On careful consideration of the authorities and of the provisions of the Code, it seems to me that the intention of the Land Code is that the occupation of State land under Section 17 should be temporary and under licence only; that Sections 250 and 251 are intended to supply a summary procedure for the ejectment of temporary occupants who hold over; and that occupation of State land *without* licence whether because it has expired or because it was never acquired is contrary to the provisions of the Code in that it is inconsistent with its provisions, (see *Mercantile Steamship Company v. Hall*) and it is intended to be included within the meaning of the term "unlawful occupation".

The respondent, although duly served, did not appear on the hearing of the appeal, and in her absence her son (who of course had no *locus standi* to address the Court) requested the Deputy Public Prosecutor to put forward certain points on her behalf, which he very properly did. Many of these points were irrelevant to the matters in issue. I am not concerned, for example with the question whether it is proper or desirable for all the licences in a particular area to be cancelled at the same time. There is clearly nothing illegal in this, and I am concerned only with the legal position of the parties.

One point, however, was raised on behalf of the respondent which requires consideration and that is the contention that the respondent has been allowed insufficient time to prepare for removal. There is authority for the proposition that a licensee whose licence is revoked is entitled to reasonable notice of revocation (*Canadian Pacific Company v. King*[6]). If the respondent was in fact a licensee then, in view of the fact that the building of a dwelling house on the land was permitted she would probably be entitled to reasonable notice. I do not think the fact that compensation is contemplated by the terms of the licence would affect this and she would be entitled to a reasonable time in which to remove what she had placed on the land; but, of course, in view of the terms of the licence, even a dwelling house could properly be only temporary structure. In my opinion the ninety days' notice given was in all the circumstances reasonable.

It may well be that, in the circumstances which existed at the time when the licence in question expired, namely, that the country was under a British Military Administration which was in practice not administering all the laws, the respondent might have been entitled to assume an implied permission to her to renew the licence and may therefore have been entitled to remain upon the land in the expectation that the necessary licence would be issued to her as soon as the Administration was in a position to deal with the matter. Moreover, the form of the notice served might be construed as an admission that the licence was still valid. I need not decide, however, whether the occupation from the beginning of the year 1946 until the expiration of the notice to vacate was or was not "Unlawful occupation" because in my opinion, for the reasons I have given from the expiration of that notice the respondent became a mere trespasser.

The notion that those occupiers who have been in occupation of the same plot of land for a very long period of years under licences which have been renewed year by year have acquired any right to further renewal or any exemption from revocation during the currency

of the licence is one which in my opinion is completely disposed of by Section 17 of the Land Code. There is a natural tendency on the part of occupiers of premises on a temporary basis for their sense of insecurity to diminish with the passage of time. It is well, therefore, that it should be made clear to those concerned that *temporary* occupation of State land is no more than its name implies.

The appeal is allowed.

Appeal Allowed.

PUBLIC PROSECUTOR v. CHIN KEOW And PUBLIC PROSECUTOR v. FONG TOW YIN.

[App. Crim. Juris. (Spenser-Wilkinson, J.) February 25, 1947]

Land Code, Sections 250, 251 and 252—Summons to show cause why a warrant should not issue commanding the Police forthwith to remove a person in unlawful occupation of State Land—Proceedings in such a case are criminal and not civil proceedings—"Criminal cause or matter"—Appeal lies under Section 307 of the Criminal Procedure Code—Summons under Section 251 of the Land Code is not a suit, action or other proceeding within the meaning of Section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946—Whether reasonable notice to vacate the premises is necessary.

These two appeals raised the same questions of law and were dealt with together. The respondents in each case were in occupation of State Land and were brought before the District Court under Sections 250 and 251 of the Land Code to show cause why a warrant should not be issued under the latter section. In each case the respondent had been issued with a temporary occupation licence during the Japanese occupation, but no such licence had been issued to them in respect of the year 1946. The learned District Judge dismissed the summons in each case upon the ground that the provisions of the Courts (Restriction of Civil Jurisdiction) Ordinance 1946, debarred the Court from entertaining the proceedings. He also expressed the view that an appeal did not lie from his decision. He also held in the first case that the prosecution had not proved service of a notice to the occupier to quit.

Held, (1) that proceedings under Sections 250 and 251 of the Land Code are criminal both in their nature and in their form and that therefore an appeal lies from the District Court in respect of such proceedings under Section 307 of the Criminal Procedure Code;

(2) that the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946 does not apply to criminal proceedings and therefore does not apply to proceedings under Sections 250 and 251 of the Land Code;

(3) that the question whether a notice to quit is necessary in such cases and what length of notice is reasonable is one which depends upon the facts of each case.

Cases referred to:—

(1) *Chew Cheng Swee v. Chan Chye Neo* 1 M.L.J. 5.

(2) *Seaman v. Burley* (1896) 2 Q.B. 344.

(3) *Amand v. Home Secretary and another* (1943) A.C. 147.

(4) *R. v. Appeals Committee* (1946) 1 A.E.R. 129.

(5) *Yeo Peck Chie v. K. S. Gill & Co.* (1946) 12 M.L.J. 131.

(6) *Public Prosecutor v. Yap Tai* (1947) 13 M.L.J. 50.

CRIMINAL SUMMONS APPEAL FROM DISTRICT COURT.

Spenser-Wilkinson, J.: —These two appeals raise the same questions of law and I therefore deal with them together.

The respondents in each case were in occupation of State Land and were brought before the District Court under Sections 250 and 251 of the Land Code to show cause why a warrant should not issue under the latter section. In each case the respondent had been issued with a temporary occupation licence during the Japanese occupation, but no such licence had been issued to them in respect of the year 1946.

The learned District Judge dismissed the summons in each case upon the grounds that the provisions of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, debarred the Court from entertaining the proceedings. He also expressed the view that, on the authority of *Chew Cheng Swee v. Chan Chye Neo*[1], an appeal did not lie from his decision and that the appeal in this case was not in order because the notice of appeal was given by the Deputy Public Prosecutor who was not a party to the proceedings.

The questions whether the Court had jurisdiction and whether an appeal lies in this case both depend ultimately upon whether or not proceedings under Sections 250 and 251 of the Land Code are criminal or civil proceedings. The District Judge quotes *Chew Cheng Swee v. Chan Chye Neo*[1] as authority for the proposition that there is no appeal in law under the Land Code. In that case it was decided that no appeal lay from the decision of a District Court in